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IN THE

Supreme Court of the United States

JOHN GEDDES LAWRENCE and TYRON GARNER,
Petitioners,

v.

STATE OF TEXAS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals of Texas Fourteenth District

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE*, PRO FAMILY LAW CENTER, IN SUPPORT OF DENYING REVIEW

RICHARD D. ACKERMAN *
GARY G. KREEP
UNITED STATES JUSTICE FOUNDATION
2029 East Valley Parkway, Suite 1-C
Escondido, California 92027
(760) 741-8086

* Counsel of Record

Counsel for *Amicus Curiae*

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This motion is made pursuant to Supreme Court Rule 37.2. Permission from the other parties has not been granted for the filing of this *amicus* brief.

Filing of this brief will be helpful to the court as *Amicus Curiae* is familiar with the issues in this case.

Amicus Curiae, Pro-Family Law Center (PFLC), is a division of Abiding Truth Ministries, a non-profit corporation organized under the laws of the state of California. PFLC is dedicated to protecting marriage and the natural family and opposing the legitimization of homosexuality and related conduct in American society. It has been active in formulating and analyzing public policy related to homosexuality and in public advocacy of family values since its founding in 1999.

PFLC director, Scott Douglas Lively, is an attorney licensed to practice law in the State of California and an

internationally recognized expert on the topic of homosexuality in society. On behalf of PFLC, Mr. Lively has served as an advisor and consultant to family values activists and organizations globally, and has addressed conferences on these issues in the United States, Canada, Great Britain and East Africa.

PFLC's extensive involvement in the public discussion of homosexuality and related conduct enable it to provide this Court with an important perspective. In this brief, PFLC addresses the Equal Protection challenge to the Texas Homosexual Conduct Law and the rational basis for treating same-sex and opposite-sex sodomy differently under the law. PFLC urges the Court to deny Petitioner's Writ of Certiorari to overturn the Homosexual Conduct Law.

Moreover, both attorneys from the *UNITED STATES JUSTICE FOUNDATION* have served as a legal experts to the State of California's Legislature (hearings on civil unions). Counsel of Record has served as an expert to the Marriage Law Project of the Catholic University of America on same-sex relations and their impact on recognized institutions in American culture.

There are only a limited number of law firms who regularly address homosexual issues and legislation on a regular basis. *Amicus Curiae* and its Counsel of Record both do so and offer this brief to assist the Court.

Respectfully submitted,

RICHARD D. ACKERMAN *
GARY G. KREEP
UNITED STATES JUSTICE FOUNDATION
2029 East Valley Parkway, Suite 1-C
Escondido, California 92027
(760) 741-8086

* Counsel of Record Counsel for *Amicus Curiae*

August 16, 2002

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BRIEF OF *AMICUS CURIAE*, PRO FAMILY LAW CENTER, IN SUPPORT OF DENYING REVIEW

INTERESTS OF *AMICUS CURIAE*

The Pro-Family Law Center (PFLC) is a division of Abiding Truth Ministries, a non-profit corporation organized under the laws of the state of California. PFLC is dedicated to protecting marriage and the natural family and opposing the legitimization of homosexuality and related conduct in American society. It has been active in formulating and analyzing public policy related to homosexuality and in public advocacy of family values since its founding in 1999. PFLC director, Scott Douglas Lively, is an attorney licensed to practice law in the State of California and an internationally recognized expert on the topic of homosexuality in

society. On behalf of PFLC, Mr. Lively has served as an advisor and consultant to family values activists and organizations globally, and has addressed conferences on these issues in the United States, Canada, Great Britain and East Africa.

PFLC's extensive involvement in the public discussion of homosexuality and related conduct enable it to provide this Court with an important perspective. In this brief, PFLC addresses the Equal Protection challenge to the Texas Homosexual Conduct Law and the rational basis for treating same-sex and opposite-sex sodomy differently under the law. PFLC urges the Court to deny Petitioner's Writ of Certiorari to overturn the Homosexual Conduct Law.

INTRODUCTION

Review must be denied in this case. There is no constitutional right for an individual to engage in oral or anal sodomy with any person. This type of conduct is simply not implicit in any concept of ordered liberty such that a violation of substantive Due Process principles can be found. It is also not irrational discrimination to criminalize same-sex sodomy while allowing opposite-sex sodomy to remain legal. The greater public health consequences of same-sex sodomy provide a rational basis for discrimination against such conduct. Finally, *Bowers v. Hardwick*, 478 U.S. 186, 106 S.Ct. 2841 (1986) is good and necessary law to preserve the right of states to regulate conduct which can result in disease and death.

I. PETITIONERS' EQUAL PROTECTION ARGUMENT IS FAULTY

Petitioners claim that Texas law is discriminatory against homosexuals as a classification of persons. This position is not legally sound and should be rejected. To wit, Petitioners are claiming that homosexuals are unlawfully treated

differently than 'traditional' couples under the law. This could be a completely true statement and there would be no constitutional offense.

The core purpose of the Equal Protection Clause "is to prevent the States from purposefully discriminating between individuals on the basis of race." *Shaw v. Reno*, 509 U.S. 630, 642, 113 S.Ct. 2816 (1993). It was not intended "to interfere with the power of the state . . . to prescribe regulations to promote the health, peace, morals, education, and good order of the people." *Barbier v. Connolly*, 113 U.S. 27, 3, 5 S.Ct. 357 (1884). In fact, it has been recognized that a State can rarely legislate without discriminating against one group or another. *Sullivan v. U.I.L.*, 616 S.W.2d 170, 172 (Tex. 1981). By definition, the prohibition of one form of conduct over another results in discrimination against those who may or may not participate in the conduct so legislated.

The Court has at no time recognized homosexuals or other participants in sexually-defined conduct as protected classes for Equal Protection purposes. In *Board of Education of Oklahoma City v. National Gay Task Force*, 729 F.2d 1270, 1273, aff'd. 470 U.S. 903 (1985), the court affirmed the ruling of the 10th Circuit Court on this point, saying "We cannot find that a classification based upon the choice of sexual partners is suspect." It has also addressed the issue in the negative by denying review of lower decisions finding no such protection, *see*, *Rowland v. Mad River Local School District*, 730 F.2d 444 (6th Cir. 1984), *rehearing denied* 470 U.S. 1009 (1985). A denial of review is no less appropriate in this case. There is no confusion in the laws as suggested by Petitioners. (Petitioners' Brief at p. 9).

Petitioners are attempting to force this country to condone homosexual relationships and to create a universal right, based on these relationships, which has never been recognized in the Constitutional history of the United States. *See*, *Jantz v. Muci*, 976 F.2d 623 at 624 (10th Cir. 1992), *cert.*

den., 508 U.S. 952 (1993) (re discrimination against job applicants and declaring no precedent to support protected class).

As noted in Justice Burger's concurring opinion in *Bowers v. Hardwick*, *supra.*, "Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization [cites] . . . This is essentially not a question of personal "preferences" but rather of the legislative authority of the State." *Id.* at 196, 197.

II. HOMOSEXUALS ARE NOT A DISADVANTAGED CLASS FOR PURPOSES OF EQUAL PROTECTION ANALYSIS

Petitioners argue that many lesbians, gays, and bisexuals have suffered longstanding social and economic discrimination. These groups of persons are portrayed as disadvantaged groups. This is misleading and contrary to established law.

To establish a suspect/disadvantaged class, for purposes of the law, it must be shown that the plaintiff is "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from majoritarian political process." *San Antonio School District v. Rodriguez*, 411 U.S. 1, 28, 93 S.Ct. 1278 (1973). Moreover, the "immutability" of the plaintiff's characteristics is a factor to be considered. *Frontiero v. Richardson*, 411 U.S. 677, 686, 93 S.Ct. 1764 (1973).

To date, this Honorable Court has recognized five separate classes as qualifying for strict scrutiny review in the face of discriminatory actions by a state. Homosexuality is not one of these classes. Indeed, "The Supreme Court, however, has never held that homosexuals are a suspect class. Likewise,

lower courts have also refused to classify homosexuals as a suspect class. Therefore, courts have not used a suspect class analysis to apply strict scrutiny to procedural burdens on homosexual rights legislation." Seth Hilton, *Restraints on Homosexual Rights Legislation: Is There a Fundamental Right to Participate in the Political Process?* 28 U.C. DAVIS L. REV. 445, 453 (1995).

In fact, "The Supreme Court has identified several factors for determining whether a particular class of people constitute a suspect class. Class members must have an immutable characteristic, be politically powerless, and have suffered from a history of discrimination. Homosexuality usually fails this test by failing to establish an immutable characteristic.

When analyzing immutability, most have considered homosexuality strictly an issue of conduct that does not involve any irrepressible internal identification and understandings of self. In addition to the inability to clear the immutability hurdle, homosexuals have also experienced difficulty satisfying the politically powerless prong of the suspect class test. As a result of these problems, the Supreme Court has refused to declare homosexuals a suspect class." Gary Alan Colis, *Romer v. Evans: Gay Americans Find Shelter After Stormy Legal Odyssey*, 24 PEPP. L. REV. 991, 995 (1997) [citing Hilton, *Id.*]. See also, *Gay Inmates of Shelby County Jail v. Barksdale*, No. 84-5666 (6th Cir. June 1, 1987); *Dronenburg v. Zech*, 741 F.2d 1388, 1391 (D.C. Cir. 1984); *State v. Walsh*, 713 S.W.2d 508, 511, 55 USLW 2070 (Mo. 1986); *In re Opinion of the Justices*, 129 N.H. 290, 295, 530 A.2d 21, 24 (1987); *Gay and Lesbian Students Ass'n v. Gohn*, 656 F.Supp. 1045, 1057 (W.D. Ark. 1987).

In applying the above critical analyses, the recognized "suspect" classes are: "Race," *Loving v. Virginia*, 388 U.S. 1, 11, 875 S.Ct. 1817 (1967), "Alienage," *Graham v. Richardson*, 403 U.S. 365, 372, 91 S.Ct. 1848 (1971), and,

"National Origin," *Korematsu v. United States*, 323 U.S. 214, 216, 65 S.Ct. 193 (1944). The recognized quasi-suspect classes are: "Gender," *Frontiero, supra*, *Mississippi University for Women v. Hogan*, 458 U.S. 718, 723-724, 102 S.Ct. 3331 (1982), and, "Illegitimate Children," *Lalli v. Lalli*, 439 U.S. 259, 265, 99 S.Ct. 518 (1978).[1] There is a general policy against extending the protections of a 'suspect class status' to other groups. *Thomasson v. Perry*, 80 F.3d 915, 927-28 (4th Cir.), *cert. denied*, 117 S. Ct. 358 (1996); *High Tech Gays*, 895 F.2d at 571-72 (9th Cir. 1990); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464-65 (7th Cir. 1989), *cert. denied*, 494 U. S. 1004 (1990); *Padula v. Webster*, 822 F.2d 97, 103-04 (D.C. Cir. 1987); *Baker v. Wade*, 769 F.2d 289, 292 (5th Cir. 1985) (en banc), *cert. denied*, 478 U. S. 1035 (1986).

There is a remarkable factual consistency in the above classes. Each class recognized possesses characteristics that are indeed "immutable" or virtually permanent. Simply, a person does not need to "come out of the closet" to have it known that he or she is a member of some suspect class. A mere inquiry into the person's birth circumstances reveals the person's membership status.

One's race, national origin, sex, alienage, and illegitimate status are all based on biological or identifiable geographical factors beyond the control of the class member. Once the member has taken on one of these statuses through birth, the status cannot be changed. However, the only way that one can be identified as a homosexual is through voluntary verbal or physical conduct which alerts another person to one's sexual status. Simply, a homosexual must somehow, fail to keep his or her status, or relationships flowing therefrom, private. The individual must breach his or her own "right of privacy." Homosexuals are not involuntarily disadvantaged for Equal Protection purposes.

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[1] See also, http://www.family.org/cforum/research/papers/a0002964. html

While Petitioners argue that the ban on same-sex sodomy is a form of gender discrimination, this argument has been expressly rejected time and again. The laws against gender discrimination arise exclusively out of the fact that women were treated as being inferior to men. The oppression caused by this 'labeling' gave rise to a need to enact protective laws. *Reed v. Reed* 404 U.S. 71, 92 S.Ct. 251 (1971); *Phillips v. Marietta Corp.* 400 U.S. 542, 91 S.Ct. 496 (1971).

Finally, as to whether homosexuals are "politically powerless," the Ninth Circuit Court in *High Tech Gays* correctly pronounced that "homosexuals are not without political power, they have the ability to and do 'attract the attention of lawmakers'." *Supra* at 895 F.2d at 574.

III. REGULATING SAME-SEX AND OPPOSITE-SEX CONDUCT DIFFERENTLY IS PERMISSIBLE DUE TO GREATER PUBLIC HEALTH RISK OF SAME-SEX CONDUCT

Petitioners assert that "As a matter of equal protection, bare condemnation of one group of people—whether termed a moral judgment, a value judgment, or simple dislike—cannot sustain a classification like the Homosexual Conduct Law under any level of scrutiny." [Petitioners' Brief at p. 9]. This is a strawman argument.

The law in question can be justified without the least reliance on religious morality or social prejudice against self-identified homosexuals. What is condemned by the law is not a "group of people" but volitional same-sex sodomy by individuals. Public health records identify such conduct as disproportionally costly to society as opposed to sodomy committed by opposite-sex partners. This is not to suggest that opposite-sex sodomy does not harm the public health, but the type and degree of harm are different enough that criminalizing one and not the other does not violate the very

lenient standards for classifications set by the court. The standards have been summarized as follows:

> "1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary." *Morey v. Doud*, 354 U.S. 457, 77 S.Ct. 1344 (1957), citing *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79, 31 S.Ct. 337 (1911).

In *Romer v Evans*, 517 U.S. 620, 631, 116 S.Ct. 1620 (1996), the court ruled that "If a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end."

A legitimate end not addressed by the majority in the Court of Appeals is the state's interest in public health, as distinct from public morals. The states' legitimate interest in the public health has been repeatedly affirmed by this court.

> "It has been often said that the police power was not by the Federal Constitution transferred to the nation, but was reserved to the states, and that upon them rests the duty of so exercising it as to protect the public health and morals. While, of course, that power cannot be exercised by the states in any way to infringe upon the powers expressly granted to Congress, yet until there is some invasion of congressional power or of private rights secured by the Constitution of the United States, the action of the states in this respect is beyond question in the courts of the nation." *L'Hote v. New Orleans*, 177 U.S. 587, 20 S.Ct. 788 (1900). *See also Barbier v. Connolly*, *supra* at 31.

Indeed, the state interest in public health is deemed so compelling that this court has ruled that a viable unborn child may be killed to preserve the health of a mother at her option, *Roe v. Wade*, 410 U.S. 113, 164-165, 93 S.Ct. 705 (1973), even at the point of birth, *Stenberg v Carhart*, (99-830) affirming 192 F.3d 1142 (2000).

Relative to the instant circumstances, studies indicate a significantly greater threat to public health from same-sex than from opposite-sex relationships, especially regarding AIDS. According to the most recent statistics compiled by the Centers for Disease Control, same-sex relationships account for 361,867 of the 793,026 total cases of AIDS reported in the United States as of June, 2001, while homosexual intravenous drug users accounted for another 50,066 cases. This is compared to 85,738 cases caused by opposite-sex relations.[2] An alarming recent increase in drug resistance to AIDS, or AIDS "super-infection," is also highest among homosexuals.[3]

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[2] CDC website http://www.cdc.gov/hiv/stats.htm#exposure

[3] *Antiretroviral-Drug Resistance among Patients Recently Infected with HIV*, New England Journal of Medicine, Volume 347:385-394, August 8, 2002. Susan J. Little, M.D., Sarah Holte, Ph.D., Jean-Pierre Routy, M.D., Eric S. Daar, M.D., Marty Markowitz, M.D., Ann C. Collier, M.D., Richard A. Koup, M.D., John W. Mellors, M.D., Elizabeth

The magnitude of the disparity between same-sex and opposite-sex conduct cannot be overlooked. According to the widely respected 1994 University of Chicago study "Sex in America: A Definitive Survey," only 5% of men and 4% of women have engaged in same-sex conduct at any time in their lives, with just 2.8% of men and 1.5% of women choosing homosexual relations exclusively.[4] There is thus a dramatically disproportionate public health risk associated with same-sex conduct as opposed to opposite-sex conduct.

Oxford University's International Journal of Epidemiology reported a dramatic impact on the average age of mortality for those involved in same-sex relationships.

> "In a major Canadian centre, life expectancy at age 20 years for gay and bisexual men is 8 to 20 years less than for all men. If the same pattern of mortality were to continue, we estimate that nearly half of gay and bisexual men currently aged 20 would not reach their 65th birthday. Under even the most liberal assumptions, gay and bisexual men in this urban centre are

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Connick, M.D., Brian Conway, M.D., Michael Kilby, M.D., Lei Wang, Ph.D., Jeannette M. Whitcomb, Ph.D., Nicholas S. Hellmann, M.D., and Douglas D. Richman, M.D.

[4] R. Michael, J. Gagnon, E. Laumann, *Sex in America: A Definitive Survey* (Boston: Little, Brown and Company, 1994), pp. 175-177; Tom W. Smith, "*American Sexual Behavior: Trends, Socio-Demographic Differences, and Risk Behavior*," National Opinion Research Center, GSS Topical Report No. 25, December 1998, p. 50. See also Dawson, D. A., "*AIDS Knowledge and Attitudes*," [various dates] Advance Data, *National Center for Health Statistics:* DHHS Pub. No. (PHS) 88-1_250, nos. 160, 161, 163, 176, 183, 193 reporting on a Federal government study considered to be the largest continuing survey of homosexual activity ever conducted, reaching 119,347 randomly selected adults by March of 1991. This study revealed that only 3% of males had reported any homosexual activity since 1977.

> now experiencing a life expectancy similar to that experienced by all men in Canada in the year 1871." [5]

Numerous diseases other than AIDS disproportionately affect same-sex partners.. Unlike AIDS, such diseases are prevalent in female same-sex relationships as well. The Medical Institute for Sexual Health reported that "Homosexual men are at significantly increased risk of HIV/AIDS, heaptitis, anal cancer, gonorrhea and gastrointestinal infections as a result of their sexual practices. Women who have had sex with women are at significantly increased risk of bacterial vaginosis, breast cancer and ovarian cancer than are heterosexual women." [6]

Neither are same-sex health risks limited to physical problems; they include mental health problems as well. In 2001, the Journal of the American Medical Association reported that:

Compared to other men, males who engage in same-sex conduct are:

> 727 percent more likely to have suffered bipolar disorders at some point in their lives, and 502 percent more likely in the last twelve months.
>
> 718 percent more likely to have suffered obsessive-compulsive disorder in the last twelve months, and 620 percent more likely at some point in their lives.
>
> 632 percent more likely to have suffered agoraphobia (fear of leaving home or being in public) in the last twelve months, and 454 percent more likely at some point in their lives.

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[5] Hogg, R.S., et al., *Modeling the Impact of HIV Disease on Mortality in Gay and Bisexual Men*, International Journal of Epidemiology, Vol. 26, 657-661, 1997.

[6] Medical Institute for Sexual Health, "Executive Summary: Health Implications Associated with Homosexuality," 1999.

421 percent more likely to have suffered panic disorder, and 229 percent more likely to have suffered social phobia at some point in their lives.

375 percent more likely to have suffered simple phobia in the last twelve months, and 361 percent more likely at some point in their lives.

311 percent more likely to have suffered mood disorders at some point in their lives, and 293 percent more likely in the last twelve months.

261 percent more likely to have suffered anxiety disorders in the last twelve months, and 267 percent more likely over the course of their lifetimes.

270 percent more likely to have suffered two or more psychiatric disorders during their lifetime.

235 percent more likely to have suffered major depression at some point in their lives.

Compared to other women, females who engage in same-sex conduct are:

405 percent more likely to have suffered a substance use disorder.

241 percent more likely to have suffered mood disorders during their lifetimes.

209 percent more likely to have suffered two or more mental disorders during their lifetimes.[7]

While it cannot be stated conclusively that increased incidents of mental health and other disorders among persons involved in same-sex relationships are directly related to the

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[7] Sandfort, Theo G.M, et. al., *"Same-Sex Sexual Behavior and Psychiatric Disorders,"* Archives of General Psychiatry (Journal of the American Medical Association), Vol. 58, No. 1, (2001), cited in "The Legal Liability Associated with Homosexuality Education in Public Schools," Citizens for Community Values, Cincinnati, Ohio (2002).

practice of sodomy, such a conclusion by a state is legally permissible. It is well established that a state has broad latitude to interpret empirical data as to the secondary effects of regulated conduct. *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 4, 106 S.Ct. 925 (1986), *Paris Adult Theatre I v. Slaton* , 413 U.S. 49, 93 S.Ct. 2628 (1973).

Thus, it is no constitutional violation for the State of Texas to discriminate against same-sex sodomy.

IV. RECENT SOCIAL TRENDS ARE NOT A SUFFICIENT BASIS FOR OVERRULING *BOWERS V. HARDWICK*

Petitioners argue that *Bowers v. Hardwick* should be overturned on the grounds that "legal and social developments have undercut its reasoning and its ultimate determination that the right to privacy does not shelter the deeply personal realm of consensual, adult sexual intimacy in the home." [Petitioners' Brief at p. 9].

While it is true that several states have repealed their sodomy laws in the years since Bowers, this fact does not justify interference with the remainder of states which have retained such laws. This court only recently affirmed its "established practice, rooted in federalism, of allowing the States wide discretion, subject to the minimum requirements of the Fourteenth Amendment, to experiment with solutions to difficult problems of policy." *Smith v. Robbins*, 528 U.S. 259, 120 S.Ct. 746 (2000) and has recognized that "states possess primary authority for defining and enforcing criminal law" *U.S. v Lopez*, 514 U.S. 549, 115 S.Ct. 1624 (1995). Texas would have the right to criminalize sodomy even if it were the only state to do so.

Petitioners appeal to emotionalism, which makes up the bulk of their complaint, is equally unavailing. Euphemistic characterizations of anal sodomy as "loving behavior" [Petitioners' Brief at p.8] and "nurturing . . . intimacy "[p.13]

cannot mask the harmful nature of such conduct. Neither can such an appeal substitute for sound logic. To the extent that Petitioners implicitly suggest that their behavior is 'genetic' or 'involuntary,' they deny their own free will and responsibility for dangerous behavior with secondary effects. Mere sexual desire, no matter how compelling, cannot justify all sexual behavior. Plainly, it is the social consequences of the behavior in question, not the "sexual orientation" of the participants, that makes sodomy properly subject to criminal sanction in the public interest.

Petitioners' disregard for social consequences, however, extends beyond their own conduct. In one blow, Petitioners would virtually eliminate the ability of states to protect their citizens from destructive sexual behavior, for, as stated in *Bowers*: if the basis for finding a right to privacy for homosexual conduct is "voluntary sexual conduct between consenting adults, it would be difficult, except by fiat...to limit...adultery, incest and other sexual crimes" *Bowers v. Hardwick*, *supra* at 195-196.

CONCLUSION

Petitioners have failed to state a valid Equal Protection or Due Process claim and have not shown a legal basis for overturning Bowers. Accordingly, Petitioners request for review should be denied.

Respectfully submitted,

RICHARD D. ACKERMAN *
GARY G. KREEP
UNITED STATES JUSTICE FOUNDATION
2029 East Valley Parkway, Suite 1-C
Escondido, California 92027
(760) 741-8086

* Counsel of Record

Counsel for *Amicus Curiae*

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